Information Technology and Innovation Foundation
700 K Street N.W., Suite 600
Washington, DC 20001

Before the

FEDERAL TRADE COMMISSION

Washington, D.C.

In the Matter of:
Draft Strategic Plan for Fiscal Years 2022-2026)
Federal Trade Commission
600 Pennsylvania Avenue, NW)
Washington, DC 20580
)

Comments of ITIF

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The FTC's Strategic Plan for 2022-2026: Populism, Precaution, and the Fated Neo-Brandeisian Revolution

The Schumpeter Project on Competition Policy of the Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on the FTC's Draft Strategic Plan for fiscal years 2022-2026. The following comments caution against the FTC's new mission statement which indicates an unfortunate "Neo-Brandeisian" revolution at the FTC.

The plan, as it relates to competition policy, illustrates the radical and damaging turn in antitrust policy and enforcement that the self-proclaimed "Neo-Brandeisians" embody: The administrative preference toward small competitors and against large companies irrespective of the reality of anticompetitive structure or conduct from the latter. This bias against large companies, however innovative they can be, legitimizes undue regulatory burdens at the expense of vigorous competition, maximal innovation, and robust consumer welfare. Accordingly, we recommend that the FTC respect what propelled considerable American innovation and consumer benefits–namely strong consumer protection, reasonable antitrust enforcement, and a clear and bipartisan mission statement.

THE NEW MISSION STATEMENT: POPULISM AND PRECAUTIONARY ANTITRUST

The FTC's new mission statement is "Protecting the public from deceptive and unfair business practices and policing unfair competition through law enforcement, advocacy, research, and education." This proposed mission statement dramatically differs from well-established mission statements from the last few decades of the FTC. For instance, the FTC's current mission statement is "Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity." The FTC's Strategic Plan for 2014-2018 was "Working to protect consumers by preventing anticompetitive, deceptive, and unfair business practices, enhancing informed consumer choice and public understanding of the competitive process, and accomplishing this without unduly burdening legitimate business activity." The FTC's Strategic Plan 2003-2008 was "To prevent business practices that are anticompetitive, deceptive, or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these goals without unduly burdening legitimate business activity." Another example is the 2000 FTC's Strategic Plan which identified the FTC's mission as "to prevent business practices that are anticompetitive, deceptive, or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions but not impede legitimate business activity."

The proposed mission statement departs from traditional and well-accepted FTC goals in two main respects. First, the protection of "the public" rather than "consumers and competition" marks a departure from protecting consumer welfare and the competitive process in favor of protecting other interests such as disrupted rivals, workers and potentially select demographic groups. The protection of "the public" signifies the FTC's decision to endorse antitrust populism. Second, the removal of the expression "without unduly burdening legitimate business activity" cannot be underestimated: This choice suggests a willingness to

endorse rules of per se illegality whereby legitimate business activities–namely those pertaining to the very process of competition that the FTC is supposed to encourage–will become illegal in the name of protecting the nebulous notion of "the public." These potential per se illegality rules lead to undue regulatory interferences familiar to the logic underpinning the precautionary principle.

Antitrust populism in the name of protecting "the public"

The choice to protect "the public" rather than exclusively "consumers and competition" marks a departure from the consumer welfare standard as a way to ensure the right amount of competition: competition that enables maximal innovation and economic growth. It also signals a willingness to protect other economic interests such as less efficient and disrupted rivals, workers from any job loss, and selected demographic groups identified as disadvantaged. The new mission suggests that the FTC has embraced the assault of the consumer welfare standard launched by Neo-Brandeisians. The protection of the public would prevent companies from generating efficiencies and innovations whenever these efficiencies and innovations may substantially disrupt rivals, thereby leading to job losses (and higher productivity) and a more concentrated market structure, even if that was good for economic welfare and consumers. To overlook productivity, innovation, consumer benefits and to protect rivals' interests may very well pursue the protection of the interest of "the public" but only at the expense of American consumers and American innovation capabilities. This is especially the case if the "public" is defined as any entity or person who may be negatively affected by a business action.

The protection of "the public" rather than the protection of consumers and competition will lead the FTC to lose sight of the necessary focus on promoting consumer welfare and fostering innovation: It will irremediably lead to undue protection of business interests disrupted by the evolutionary process of competition, and to undue protection of jobs at the expense of technological improvements, higher productivity, and improved living standards.

The protection of "the public" fundamentally reveals not only the abandonment of the decade-long consumer welfare standard as the North Star of antitrust enforcement but also signals a preference for an older, atomized market structure, at odds with today's technologically-driven economy. Indeed, the protection of the public refers to an outdated belief of economic democracy, oft-referred erroneously as Jeffersonian democracy, whereby an economy populated of small and less disruptive companies would better serve "the public," and large "capitalist" corporations would be either broken up or heavily regulated. The protection of market structure in the name of the protection of "the public" endorses a big-is-bad rhetoric that ultimately would cost middle class Americans per-capita income growth.

The protection of "the public" as a substitute to the protection of consumers and competition represents the Neo-Brandeisians' belief that the economy needs to be structured around small and medium-sized companies and that antitrust enforcement must not be dedicated to merely addressing anticompetitive conduct but more broadly to deconcentrate the economy away from large corporate form. The protection of "the public" therefore embodies the antitrust populism where regulators sideline efficiencies and innovations for the sake of deconcentrating the economy and not sanctioning anticompetitive conduct. Consequently, protecting "the

public" implies that procompetitive, pro-productivity, and pro-innovative conduct will no longer be tolerated whenever they frustrate the regulators' discrete conceptualization of "the public." Harm to consumers and innovations will inevitably ensue since they explicitly no longer are the FTC's mission.

Ironically, the level of competition will decrease too, as illustrated by the FTC's vision change. The proposed FTC's vision is "a vibrant economy fueled by fair competition, open markets, and an empowered, informed public." This vision departs from the current vision accepted for decades of "a vibrant economy characterized by vigorous competition and consumer access to accurate information." The shift from "vigorous competition" to "fair competition" clearly suggests that aggressive competition through disruptive innovations may harm inefficient and established rivals and may not constitute "fair competition": The populist vision of antitrust underpinning the goal of protecting "the public" would lead to a reduced competitive rivalry.

With the objective of protecting "the public," the Neo-Brandeisian leadership of the FTC may, unfortunately, succeed in depleting innovation, ignoring consumer benefits, and reducing competition–these unintended consequences resulting from the peculiar pursuit of "fair competition."

Precautionary antitrust in the name of undue burdening of legitimate business activities

Perhaps even more puzzling than the abandonment of the consumer welfare standard and the endorsement of antitrust populism through the protection of "the public," the removal of the expression "without unduly burdening legitimate business activity" signals the FTC's desire to unduly burden legitimate business activities, or at least to proceed with little attention to it, all presumably in search of "economic democracy" where large corporations are sidelined or regulated. As a result, the reasonable balancing exercise pertaining to any cost-benefit analysis of regulatory interventions disappears: The objective is to interfere with the competitive process at any cost, irrespective of the high costs these regulatory interventions may generate on "legitimate business activities."

The FTC's unconstrained regulatory interventions would necessarily lead not only to a disregard for any cost-benefit analyses that any administrative body would legitimately carry out before intervening, but it would also lead to rules of per se illegality. Indeed, since arguments pertaining to the necessary reasonableness or proportionality of the regulatory interventions will become ineffective, some conduct will be prohibited irrespective of any efficiency or innovation considerations elaborated by targeted companies. In other words, the FTC will replace the balancing exercise inherent to the widespread rule of reason in antitrust enforcement with categorical imperatives: Per se illegality rules loom after years of appreciated retreat, with all the unintended consequences such comeback inevitably suggests.

But beyond the costly regulatory interventions and overt disregard for defendants' right to be heard, the removal of the expression "without unduly burdening legitimate business activity" reveals a more profound shift that the FTC appears ready to make. Indeed, removing this expression is part of a broader attempt from Neo-Brandeisians to revolutionize antitrust from being primarily an ex-post judicial enforcement mechanism toward an ex-ante administrative mechanism, in service of a widespread social policy agenda. The FTC has already signaled its intention to make use of Section 5 of the FTC Act to tackle so-called "unfair methods of

competition", as well as it has already embarked on the reversed burden of proof for several mergers. These changes reveal a pattern of taking antitrust away from the courts (for the sake of timely regulatory interventions) in favor of regulatory interferences irrespective of the costs created on defendants' legitimate business activities.

This pattern pertains to a precautionary logic: The FTC aims at developing preventative measures designed to protect "the public," even if this means prohibiting procompetitive and proinnovative conduct that benefit consumers and are the essence of the competitive process. In other words, the foundational elements of the precautionary principle (i.e., early regulatory interventions, reversed burden of proof, hypothetical but not evidenced harm) are present in the FTC's intent to pursue its mission free from the constraint of not "unduly burdening legitimate business activity." The FTC may burden these legitimate activities in protecting "the public" through an atomized market structure, not in protecting innovation (since innovations result from, and generate, "imperfect" market structure). The removal of the expression in the mission statement thus marks the eagerness of the FTC to unboundedly intervene in regulating markets rather than merely sanctioning anticompetitive conduct, so that precaution rather than innovation becomes the primary concern of regulators.

Indeed, any efficiency argument or innovation rationale may constitute these "legitimate business activities" that the FTC seems no longer keen to hear and consider. Absent efficiency or innovation considerations, the precautionary logic will predominate FTC's interventions: The agency could likely intervene whenever a change in the market structure may harm some rivals identified as part of "the public." Unconstrained by the commonsensical need to burden business activities reasonably, the FTC could very well embark on a sort of "precautionary antitrust" whereby the precautionary principle regulates antitrust interventions with a preference of precaution over innovation at the expense of market dynamism and consumer benefits. The removal of this expression is of considerable consequence in the upcoming precautionary antitrust the FTC is about to implement against market realities and disregarding fundamental principles of the rights to a defense.

Overall, the FTC's new mission statement not only represents both antitrust populism with the abandonment of the consumer welfare standard in favor of the protection of "the public" and precautionary antitrust with the shift to ex-ante regulatory rules of per se illegality, but it also represents the acceptance of a less "vigorous competition" in favor of the tepid version of competition–i.e., "fair competition." Disruptive innovations as means to compete may not represent the fair competition the new FTC wants to preserve. Rather, the fair competition the FTC seeks to preserve is where jobs are protected against technological leaps, and sluggish rivals find accommodating venues at the FTC for them to be insulated from competitive pressures. This is not vigorous competition. The opportunity costs of the lack of vigorous competition are the collateral damages caused to American consumers and innovation capabilities. The proposed Neo-Brandeisian revolution at the FTC is unfortunate and ITIF respectfully requests the FTC to not adopt this proposed new mission statement.